

Congress of the United States

Washington, DC 20510

May 22, 2018

The Honorable Betsy DeVos
Secretary
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202

Re: Docket ID ED-2017-OPE-0085, Evaluating Undue Hardship Claims in Bankruptcy

Dear Secretary DeVos:

To help address the urgent student debt challenges facing our country, we urge the U.S. Department of Education (“Department”) to take decisive action to reduce the nearly insurmountable barriers that distressed borrowers face when seeking to have their student loans discharged in bankruptcy. Specifically, we ask that the Department revise its 2015 guidance to simplify and improve the standard and process by which the Department will consider a student loan borrower to have established an “undue hardship” that qualifies for bankruptcy discharge under existing federal law, per 11 U.S.C. §523(a)(8). Far too many borrowers have been prevented from reestablishing their financial lives and security because they have no realistic way to pay back their federal student loan debt or have it discharged. The Department has the power to make bankruptcy discharges a fair and credible option for borrowers who desperately need help, and we urge the Department to do so.

Today, 44 million Americans owe more than \$1.5 trillion in student loan debt. Cumulative student loan debt has surpassed credit card debt and is the second largest category of private consumer debt behind only mortgages.¹ College graduates in 2015 owed \$30,100 on average after completing a four-year degree.² Rates of default and delinquency remain persistently high. While borrowers strive to repay this debt in a timely manner, unanticipated life events and other factors outside of a borrower’s control cause many to struggle to do so. Additionally, evidence suggests that student debt has become a particularly acute crisis for students of color and other underrepresented groups, who are facing shocking levels of default and delinquency, often at twice the rate of their white peers.³

¹ Federal Reserve Bank of New York, “Total Household Debt Increases, Driven by Mortgage, Auto and Credit Card Debt,” August 15, 2017. [Press release]. Retrieved from <https://www.newyorkfed.org/newsevents/news/research/2017/rp170815>

² The Institute for College Access and Success. “Student Debt at the Class of 2015,” October 2016. Retrieved from https://ticas.org/sites/default/files/pub_files/classof2015.pdf

³ Scott-Clayton, Judith. “The Looming Student Loan Default Crisis is Worse Than We Thought.” The Brookings Institute, January 11, 2018. Retrieved from <https://www.brookings.edu/research/the-looming-student-loan-default-crisis-is-worse-than-we-thought/>

Unfortunately, under your leadership the Department has contributed to the debt challenges that students face. For more than a year, the Department has worked to weaken or eliminate a number of policies designed to help struggling borrowers escape or avoid unmanageable student loan debt, including the Borrower Defense and Gainful Employment rules, collaboration with the Consumer Financial Protection Bureau, student loan servicing reforms, and guidance preventing guaranty agencies from charging defaulted borrowers excessive fees to rehabilitate loans. Recently, the Department also announced another round of deregulation in the coming year to further weaken federal guardrails for students and taxpayers that will undoubtedly result in more opportunities for predatory corporations to take advantage of students.⁴ The Department has also endorsed making student loan repayment options more expensive and eliminating the Public Service Loan Forgiveness program in its annual budget requests. The Department's actions to cut off paths to debt relief for borrowers who have been cheated or victimized by predatory for-profit colleges and roll back other protections for borrowers, including rescinding a prohibition on guaranty agencies charging defaulted borrowers exorbitant fees, will likely increase the number of Americans whose debt burden and financial circumstances force them to consider bankruptcy.

Borrowers should ideally enter into bankruptcy only as a last resort, but it can provide those who need to do so with a fresh start to their financial lives. Most forms of debt can be discharged through the bankruptcy process, but federal law makes student loan debt nondischargeable in bankruptcy unless the borrower can demonstrate that he or she would face an "undue hardship" if the debt is not discharged. Congress intended this exception to provide an avenue for relief for hard-hit borrowers. But, this undefined statutory term has been largely left open to interpretation by courts which have established different legal standards for a borrower to show "undue hardship". In practice, the bar for discharge has proven to be extremely high, leaving many of those who should qualify for relief instead saddled with a lifetime of crushing debt.

Student borrowers are further hampered by a lack of clarity in the Department's current 2015 guidance regarding the circumstances under which taxpayer-subsidized student loan companies and institutions of higher education should challenge a borrower's effort to get his or her federal student loans discharged.⁵ This guidance undoubtedly results in borrowers being "inadvertently discouraged from filing an adversary proceeding in their bankruptcy case," just as the Department suggests.⁶ Borrowers are also discouraged from filing an adversary proceeding to discharge their student loans because of the history of aggressive litigation defense by loan holders, the substantial cost of legal representation of debtors, the uncertainty of litigation, and the complexity of the process.

⁴ Stratford, Michael. "DeVos looks to ease rules on religious colleges." *Politico*, May 9, 2018. Retrieved from <https://www.politico.com/newsletters/morning-education/2018/05/09/devos-looks-to-ease-rules-on-religious-colleges-208702>

⁵ Office of Federal Student Aid. "Undue Hardship Discharge of Title IV Loans in Bankruptcy Adversary Proceedings." *The Department of Education*, July 7, 2015. Retrieved from <https://ifap.ed.gov/dpceletters/GEN1513.html>

⁶ The Department of Education. "Request for Information on Evaluating Undue Hardship Claims in Adversary Actions Seeking Student Loan Discharge Bankruptcy Proceedings, February 21, 2018. Retrieved from <https://www.regulations.gov/document?D=ED-2017-OPE-0085-0001>

The Department's request for information (RFI) solicits feedback regarding several aspects of existing law and Department guidance including: factors to be considered in evaluating "undue hardship" claims; weight to be given to such factors; whether the use of two judicially-established tests (the *Brunner* test and the "totality of the circumstances" test) results in inequities among borrowers; circumstances under which loan holders should concede an "undue hardship" claim by the borrower; and whether and how the Department's 2015 guidance on "undue hardship" should be amended.

We encourage the Department to use this opportunity to make it simpler and fairer for borrowers who have demonstrated legitimate hardships to receive an "undue hardship" discharge. Additionally, we urge the Department, as part of this effort, to promote transparency by making public key data on its student loan portfolio. We have included in the appendix to this comment a list of relevant data that we request the Department provide in order to better inform this reevaluation effort.

After considering all received comments and providing relevant data, the Department should lay out a simpler and fairer process for evaluating when it will consent to discharge of student loans under "undue hardship" in a bankruptcy proceeding. The Department should, at a minimum, do the following:

1. **Recognize situations where "undue hardship" claims should be stipulated.** The Department should clearly identify situations of severe disability or financial adversity where the Department will determine that, when presented with satisfactory proof regarding the situation, the borrower should qualify for a determination of "undue hardship." This should include, at a minimum, situations where the borrower:
 - has been determined by the Secretary of Veterans Affairs to be unemployable due to a service-connected disability but not otherwise eligible for a "total and permanent disability" discharge;
 - is a family caregiver of an eligible veteran pursuant to 38 U.S.C §1720G;
 - derives income solely from retirement benefits under the Social Security Act or from a retirement fund or account, and the annual household income for the borrower is less than 200 percent of the official federal poverty guidelines;
 - provides for the care and support of an elderly, disabled, or chronically ill household member of member of the borrower's immediate family and the annual household income for the borrower is less than 200 percent of the official federal poverty guidelines;
 - is receiving disability benefits under the Social Security Act; or
 - during the five-year period preceding the filing of the bankruptcy petition (exclusive of any applicable suspension of the repayment period), has annual household income that is less than 175 percent of the official federal poverty guidelines.

2. **Reduce unnecessary paperwork and litigation on borrowers and their families.**

Department guidance should encourage student loan holders collecting on student loans to avoid unnecessary costs of opposing an “undue hardship” discharge and to accept from the borrower satisfactory proof of “undue hardship” based on the criteria specified above without engaging in formal litigation discovery. If the borrower can demonstrate credibly that he or she meets any of the “undue hardship” criteria with a preponderance of the evidence, the Department’s guidance should direct the holder to promptly enter into a settlement agreement or consent order with the borrower providing for the discharge of the student loan.

3. **Indicate a preference for the “totality of the circumstances” test over the *Brunner* test.**

Currently, federal courts are divided on the best way to evaluate the term “undue hardship.” Some circuits employ the *Brunner* test (based on *Brunner v. New York State Higher Edu. Serv. Corp.*, 2d Cir. 1987), which requires that a borrower show that:

- they cannot maintain, based on current income and expenses, a “minimal” standard of living for herself and her dependents if forced to repay the loans;
- additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans (i.e., “certainty of hopelessness”); and
- they have made “good faith” efforts to repay their loans.

Other circuits use a “totality of the circumstances” test, which looks holistically at a borrower’s past, present, and predictable future circumstances when making a decision. Should any new guidance by the Department indicate a preference for one test over another, we recommend that the Department express a preference for the “totality” test over the *Brunner* test for two critically important reasons. First, the “totality” test allows for more case-by-case flexibility compared to *Brunner*, where if a borrower fails even one of the three prongs, they cannot obtain a discharge even if their circumstances as a whole suggest they do face “undue hardship.” Second, even courts that use *Brunner* are divided over how to interpret a number of issues within the three prongs, resulting in inconsistent application of the “certainty of hopelessness” and “good faith” prongs and significant questions as to what should be considered reasonable living expenses, how medical conditions should be weighted, and whether the value of the education received should be taken into account.

Brunner has simply failed to provide a workable framework that can be applied consistently and fairly across jurisdictions. The “totality” test better accommodates judicial consideration of the unique circumstances that each borrower faces.

4. **Acknowledge that income-driven repayment (IDR) does not eliminate “undue hardship” and may present further challenges and liabilities for certain borrowers.**

Borrowers have a number of reasons for not enrolling in—or falling out of—IDR plans. In many cases, borrowers receive poor information from their loan servicers and may be unaware that these repayment options even exist. The failure of student loan servicers, like

Navient, to properly inform borrowers about IDR plans and even steer them away from the option is well documented.⁷ Such actions lead to billions of dollars in unnecessary interest payments, making it more difficult for borrowers to repay their loans while lining these companies' coffers. Borrowers who do seek to enroll in IDR face additional challenges, including a cumbersome application process and challenges in completing the yearly recertification required for participation.⁸ Furthermore, in some cases borrowers who successfully enroll in IDR and continue to recertify yearly may end up making no significant repayment on their debt. Many low-income borrowers in IDR plans may have no realistic hope for ever paying off their debt or making substantial progress in reducing their principal balance.

This reality makes the application of *Brunner* to IDR highly problematic because borrowers who end up in bankruptcy would likely experience more harm than benefit from enrolling in an IDR plan. For this reason, the fact that a borrower would be eligible for a zero-dollar payment in an IDR plan should *not* be considered as evidence that a borrower is acting in bad faith in seeking a discharge of student loans in bankruptcy. In such a circumstance, there would be no benefit to be gained by forcing a borrower into an IDR plan given the administrative costs to the borrower and taxpayers. Moreover, these borrowers would experience negative amortization on their debt while on IDR plans. The interest accruing to them will outstrip the borrower's ability to pay, making it less likely with each passing day that any reasonable payment amount will ever be received. Additionally, the borrower could face a substantial tax bill once the borrower reaches the lifetime cap on their IDR payments, which remains a loophole in federal tax law. This tax liability could plunge the borrower into further financial distress.

For these reasons, we recommend that the Department issue guidance directing that the availability of and enrollment in IDR plans should *not* be considered in an "undue hardship" calculation.

- 5. Request public comment on the existing cost-benefit analysis threshold.** Under current regulations, entities holding student loans are instructed not to oppose a borrower's request for a determination of whether a loan is dischargeable in bankruptcy if the litigation costs to pursue the matter are estimated to exceed one-third of the total amount owed on the loan including current principal balance, any unpaid accrued interest, and current, unpaid accrued collection cost.⁹ We believe that the data we have requested in the appendix to this comment would be helpful in reevaluating the threshold calculation for this cost-benefit analysis. We encourage the Department to consider submitting a separate request for public comment on this issue after providing the data requested.

⁷ Consumer Financial Protection Bureau, "CFPB Sues Nation's Largest Student Loan Company Navient for Failing Borrowers at Every Stage of Repayment," January 18, 2017. Retrieved from <https://www.consumerfinance.gov/about-us/newsroom/cfpb-sues-nations-largest-student-loan-company-navient-failing-borrowers-every-stage-repayment/>

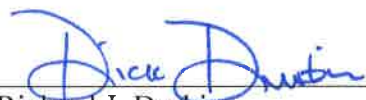
⁸ Campbell, Colleen. "Income-Driven Repayment Isn't Enough to Prevent Default." *The Center for American Progress*, May 19, 2017. Retrieved from <https://www.americanprogress.org/issues/education-postsecondary/news/2017/05/19/432751/income-driven-repayment-isnt-enough-prevent-default/>

⁹ 34 C.F.R. §682.402(iii); 34 C.F.R. §674.49(c)(4), (5).

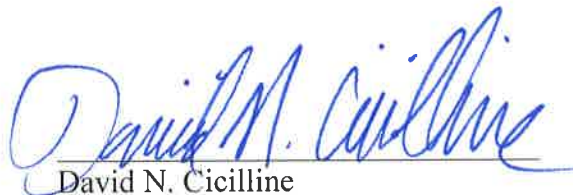
The need for action to alleviate the burden of student loan debt on struggling borrowers is even more urgent now than it was in 2015 when the Department issued its initial guidance. We believe that it would be an inefficient use of taxpayer dollars and a detriment to student borrowers if the result of the Department's current reevaluation were only to maintain the status quo or, worse, to make bankruptcy discharges even more difficult to obtain. Aggressive litigation in bankruptcy court against student borrowers who are unlikely to make a reasonable repayment to the federal government is a waste of taxpayer resources and a short-sighted policy that keeps millions of Americans from contributing to economic growth.

We urge the Department to accept our recommendations which would make the process of evaluating "undue hardship" claims simpler and fairer to borrowers. We also request that the Department provide the data requested in this appendix by June 22, 2018. We look forward to your response to our comments, and hope that you will decide to act in the best interest of America's students.

Sincerely,



Richard J. Durbin
United States Senator



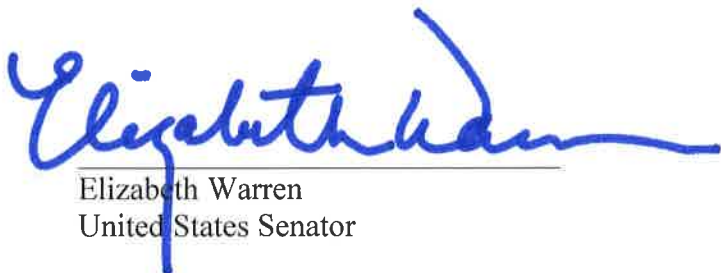
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Chris Van Hollen
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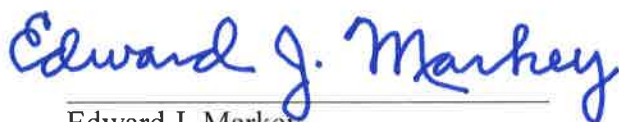
Hakeem Jeffries
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Tammy Baldwin
United States Senator



Henry C. "Hank" Johnson, Jr.
Member of Congress



Edward J. Markey
United States Senator



Sheila Jackson Lee
Member of Congress



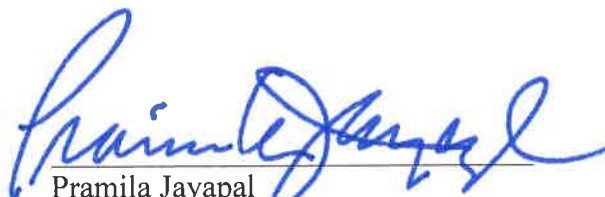
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Jeffrey A. Merkley

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Bill Foster

Bill Foster
Member of Congress



Christopher S. Murphy
United States Senator



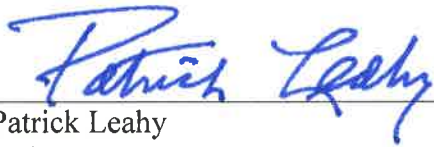
Jamie Raskin
Member of Congress



Margaret Wood Hassan
United States Senator



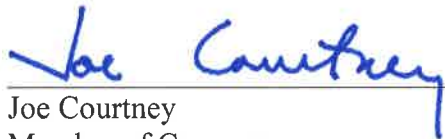
Adam B. Schiff
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Patrick Leahy
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Barbara Lee
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Joe Courtney
Member of Congress



Luis V. Gutiérrez
Member of Congress



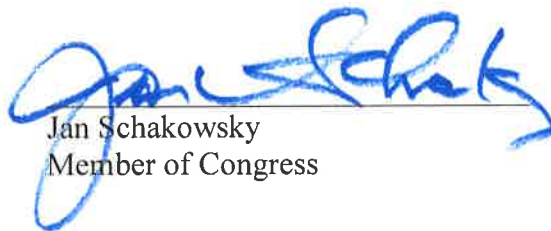
Collin C. Peterson
Member of Congress



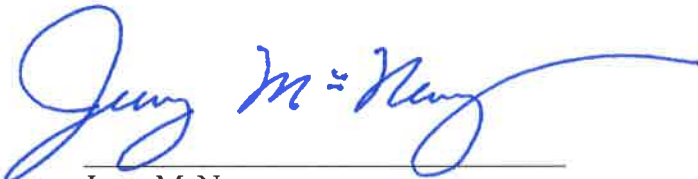
Yvette D. Clarke
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Zoe Lofgren
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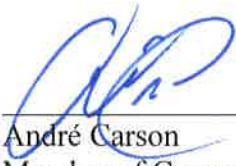
Jan Schakowsky
Member of Congress



Jerry McNerney
Member of Congress



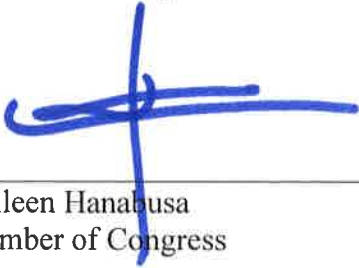
Jackie Speier
Member of Congress



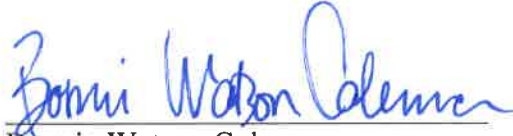
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Colleen Hanabusa
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Bonnie Watson Coleman
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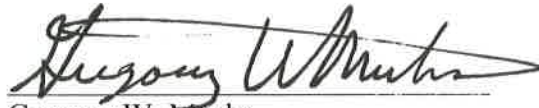
Anthony Brown
Member of Congress



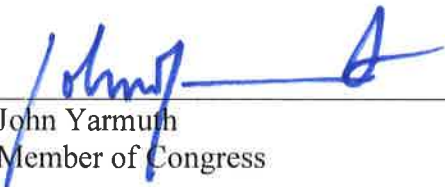
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Lucille Roybal-Allard
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Gregory W. Meeks
Member of Congress



John Yarmuth
Member of Congress



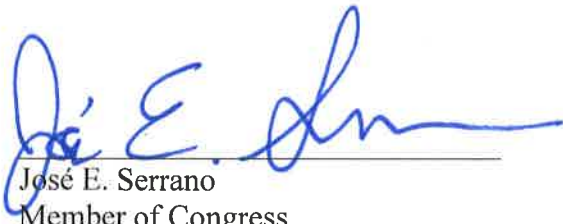
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Seth Moulton
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Julia Brownley
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José E. Serrano
Member of Congress



Judy Chu
Member of Congress



John K. Delaney
Member of Congress



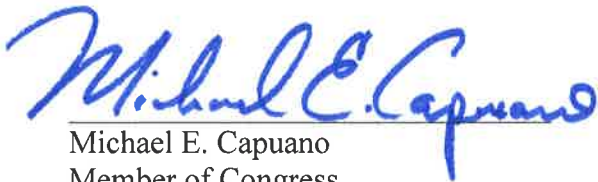
Keith Ellison
Member of Congress



Katherine Clark
Member of Congress



Ed Perlmutter
Member of Congress



Michael E. Capuano
Member of Congress



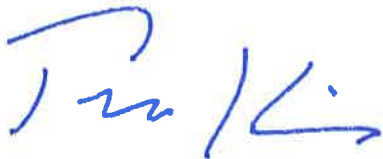
Nydia M. Velázquez
Member of Congress



Eric Swalwell
Member of Congress



Peter Welch
Member of Congress



Tim Kaine
United States Senator

Appendix

In order to better inform the RFI process, we request that the Department make public the following key data on the Department's student loan portfolio:

1. The number of federal student loans, broken down by type of loan, total dollar amount of loans, and number of loans, that have outstanding balances and that are:
 - in repayment;
 - in deferment;
 - in a grace period;
 - in forbearance;
 - temporarily uncollectible; and/or
 - permanently uncollectible.
2. The number of federal student loans, broken down by type of loan, total dollar amount of loans, and number of loans, that have outstanding balances which are based on loans that came due prior to 1992. For these loans, please identify the dollar amount of remaining balances.
3. For federal student loans that have outstanding balances which are based on loans that came due prior to 1992, how many dollars have been collected in each of the most recent five federal fiscal years? For each fiscal year, please detail how much was paid for collection services, how much was returned to the U.S. Treasury, and where any remaining collected funds were sent.
4. The amount of reinsurance payments that have been made to the Federal Student Loan Reserve Fund (FSLRF) for each of the most recent five federal fiscal years. Please also describe what other sources and amounts of payments the FSLRF received in the most recent five fiscal years.
5. Of the funds received by FSLRF for each of the most recent five fiscal years, an itemization of how much was paid out for:
 - insurance payments to lenders;
 - default claims from FFEL lenders; and
 - successful guaranty agency efforts to avert loan defaults.
 - claims relating to death, disability, closed school, or bankruptcy discharges
6. The criteria the Department uses for determining if a particular loan should be written off by the Department in its budgets, and how that criteria was established.
7. With respect to loans that have been written off:
 - A description of how the Department informs borrowers of the fact that his/her debt has been written off;
 - An explanation of whether attempts to collect on those loans are terminated or if the Department's private collection agencies (PCAs) or any other entities attempt further collections. If the latter, an explanation of what are the criteria for determining whether further collection should be pursued and how much was collected on these written-off loans in each of the most recent five fiscal years;
 - An itemization of how much PCAs were paid in each of the most recent five fiscal years for attempting collection on written-off loans; and
 - The total aggregate dollar amount of federal payments to all PCAs in each of the most recent five fiscal years.

8. An explanation of whether the Department's PCAs are permitted to pay themselves from collections they receive from borrowers, and if so, in what circumstances. Further, an itemization of how much have the Department's PCAs have received in this manner in each of the most recent five fiscal years.
9. An explanation of how fees to PCAs are determined. Specifically, do they include particular fees per loan rehabilitation, and other fees for miscellaneous discharges or cancellations? What additional itemized or general services are they paid for and how much?
10. The average cost to collect on a seriously delinquent student loan of a particular dollar amount, such as \$10,000 over five years, ten years, or fifteen years.
11. An explanation of whether Federal Student Aid (FSA) has
 - calculated any overpayments or underpayments of PCA commissions and bonuses based on actual data;
 - required PCAs to return any overpayments to the Department
 - addressed any underpayments; and
 - required PCAs to submit supporting documentation for all commissions invoiced over the previous five fiscal years.

If so, please provide detailed results, specifying the dollar amounts of overpayments or underpayments for each fiscal year affected by inaccurate or unsupported PCA invoices.

Providing this information would improve the quality of public comment that can be provided in response to the Department's RFI and would signal a commitment to an evidence-based approach to reevaluating the Department's handling of "undue hardship" claims.